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20 FEDERAL INSURANCE COMPANY

21 **UNITED STATES DISTRICT COURT**

22 **NORTHERN DISTRICT OF CALIFORNIA – SAN FRANCISCO DIVISION**

23 CROWLEY MARITIME
24 CORPORATION,

25 Plaintiff,

26 vs.

27 FEDERAL INSURANCE COMPANY;
28 TWIN CITY FIRE INSURANCE
COMPANY; and RLI INSURANCE
COMPANY,

Defendants.

No. CV 08 0830 SI

**NOTICE OF JOINDER OF
DEFENDANT FEDERAL
INSURANCE COMPANY IN
MOTION TO DISQUALIFY
RICHARD SHIVELY AND
PHILIP PILLSBURY, OF
PILLSBURY & LEVINSON, LLP,
AS TRIAL COUNSEL FOR
PLAINTIFF; MEMORANDUM
OF POINTS AND AUTHORITIES
IN SUPPORT THEREOF**

Complaint Filed: 01/07/08
Hearing Date: 08/22/08

TO ALL PARTIES AND THEIR COUNSEL OF RECORD:

PLEASE TAKE NOTICE that on August 22, 2008, at 9:00 A.M., at the above captioned court, before the Honorable Susan Illston, Defendant Federal Insurance Company ("Federal"), by and through its undersigned counsel, will and hereby does join in the motion of Defendant Twin City Fire Insurance Company ("Twin City") to disqualify Richard Shively and Philip Pillsbury, of the law firm Pillsbury & Levinson, LLP ("Pillsbury Levinson"), as trial counsel for Plaintiff Crowley Maritime Corporation ("CMC").

Federal's Joinder is and will be based upon this Notice, the accompanying Memorandum of Points and Authorities, evidence in support of the motion, pleadings and papers on file herein and upon such other evidence as the Court may entertain at the hearing of this matter.

Dated: June 13, 2008

RUDLOFF WOOD & BARROWS LLP

By: /s./ G. Edward Rudloff, Jr.

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Kevin A. Norris

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MEMORANDUM OF POINTS AND AUTHORITIES

Twin City's Memorandum of Law in Support of its Motion to Disqualify addresses the facts and legal authorities which show that Richard Shively and Philip Pillsbury should be disqualified as trial counsel for CMC. Federal submits this separate Joinder and Memorandum of Points and Authorities to address the particular grounds for disqualification that arise from Mr. Shively's and Mr. Pillsbury's direct role in the communications with Federal and related events on which CMC predicates its claims against Federal.

Federal's policy provides that CMC may not "settle or offer to settle any Claim . . . without [Federal's] prior written consent." CMC breached that requirement by negotiating and executing a written settlement agreement on March 19, 2007, without obtaining or even requesting Federal's consent — indeed, without any notice to Federal that settlement discussions had taken place. CMC asks this Court to set aside CMC's breach of the Policy's "prior written consent" requirement based solely on communications between Federal and Pillsbury Levinson that took place after CMC executed the settlement agreement. Those subsequent communications included a March 28, 2007 letter to Federal from Mr. Shively and Mr. Pillsbury and an unrecorded April 5, 2008 telephone conversation between Mr. Shively and Federal's claims examiner, Henry Nicholls.

Federal believes the undisputed facts will establish that CMC's failure to obtain Federal's prior written consent to settlement bars CMC's claims as a matter of law, without regard to any subsequent communications between Pillsbury Levinson and Federal. However, in the event the Court determines in the course of this litigation that Federal's consent defense raises fact issues, Mr. Shively and Mr. Pillsbury are CMC's primary witnesses as to those issues. The disputed issues arising from Pillsbury Levinson's communications with Federal include: the content of the communications, whether CMC and Pillsbury Levinson concealed information from Federal in the course of those communications, and what Pillsbury Levinson

1 told CMC about its communications with Federal. Under these circumstances, there
 2 is simply no way for Mr. Shively and Mr. Pillsbury to serve both as witnesses and
 3 trial counsel.

4 **I. BACKGROUND 1/**

5 CMC's complaint in this action itself predicates CMC's claims against Federal
 6 on Mr. Shively's and Mr. Pillsbury's communications with Federal in the weeks
 7 following execution of the settlement stipulation. CMC's complaint alleges (falsely)
 8 that CMC notified the Insurers in "March 2007" of a "proposed settlement."
 9 Am. Compl. ¶ 8. Although not disclosed in the complaint, this allegation is a
 10 reference to the joint letter from Mr. Shively and Mr. Pillsbury dated March 28, 2007
 11 – nine (9) days after CMC already had executed the settlement agreement. *See* Ex. A
 12 to Decl. of Michael F. Perlis in Supp. of Twin City's Mot. to Disqualify.

13 CMC's complaint further alleges that:

14 On April 5, 2007 Federal's attorney Henry Nicholls responded by
 15 telephone, advising Crowley's attorney that Federal "ha[d] no problem
 16 with consenting" to the proposed settlement. Mr. Nicholls also requested
 17 additional information relating to the settlement, which was promptly
 18 supplied by Crowley's attorneys. Crowley received no further response
 19 from Federal[.] [Am. Compl. ¶ 8 (emphasis added)]

20 This allegation references an April 5, 2007 telephone conversation between
 21 Mr. Shively and Henry Nicholls, who was then acting as Federal's claims examiner,
 22 and also references subsequent communications with "Crowley's attorneys" at
 23 Pillsbury Levinson. CMC alleges that Mr. Nicholls' communications with Mr.
 24 Shively and Pillsbury Levinson during and after the April 5, 2007 call were in bad
 25 faith, "deceptive" and "misleading," and resulted in "waiver or forfeiture or estoppel"
 26 of Federal's right to require its "prior written consent" to any settlement or settlement
 27 offer. Am. Compl. ¶¶ 8, 12, 13.

28 1/ Overall background information is set forth in Section II of Twin City's Memorandum

1 Federal believes that, as a legal matter, CMC's allegations concerning the April
 2 5, 2007 telephone conversation and other communications between the Pillsbury
 3 Levinson attorneys and Federal do not support CMC's waiver, estoppel or forfeiture
 4 assertions, much less its bad faith assertion. 2/ However, CMC obviously contends
 5 otherwise, and its allegations regarding those communications are hotly contested.
 6 Answer ¶¶ 8, 12-13.

7 Moreover, CMC's allegations about Pillsbury Levinson's communications with
 8 Federal raise a host of other issues that put the spotlight on Mr. Shively's and Mr.
 9 Pillsbury's conduct. For example, it will be necessary to explore whether Mr.
 10 Shively's and Mr. Pillsbury's March 28, 2007 letter and subsequent communications
 11 concealed information from Federal as to whether CMC was seeking coverage for
 12 any aspect of the settlement. Also, CMC's allegation that it was "deceived" by Mr.
 13 Nicholls' statements to Mr. Shively raises troubling questions about what Mr. Shively
 14 told CMC about that conversation, and whether Pillsbury Levinson or CMC actually
 15 took any action in reliance on Mr. Shively's communications with Mr. Nicholls.

16 **II. ARGUMENT**

17 As set forth in Section III of Twin City's Memorandum, disqualification of Mr.
 18 Shively and Mr. Pillsbury as trial counsel is necessary and appropriate because
 19 prejudice to the Insurers and injury to the integrity of the judicial process otherwise
 20 would result. *See, e.g., Smith, Smith & Kring v. Superior Court*, 60 Cal. App. 4th
 21 573, 579 (4th Dist. 1997). Federal in particular would be prejudiced in at least three
 22 ways.

23 First, if Mr. Shively and Mr. Pillsbury were permitted to argue waiver and
 24 estoppel to the jury, the jury may confuse such argument with Mr. Shively's and Mr.
 25 Pillsbury's testimony regarding the April 5 conversation and CMC's reaction if any

26 2/ CMC's claims fail for reasons other than its breach of the consent to settle provision. As noted
 27 in the Joint Case Management Statement, multiple issues exist regarding whether the amounts CMC
 28 seeks are covered "Loss" under the Federal Policy or are barred by certain exclusions in the Federal
 Policy.

1 thereto. *See, e.g., Ramey v. Dist. 141, Int'l Ass'n of Machinists & Aerospace*
 2 *Workers*, 378 F.3d 269, 283 (2d Cir. 2004) ("Most important, when one individual
 3 assumes the role of both advocate and witness it may so blur the line between
 4 argument and evidence that the jury's ability to find facts is undermined."); *People v.*
 5 *Donaldson*, 93 Cal. App. 4th 916, 929 (5th Dist. 2001) (discussing same risk in
 6 criminal context). Such juror confusion obviously would be prejudicial to Federal.

7 Second, Mr. Shively's and Mr. Pillsbury's roles as witnesses may cause the
 8 jury to accord undue credibility to their legal arguments regarding subjects to which
 9 they are witnesses. *See, e.g., World Youth Day, Inc. v. Famous Artists Merch. Exch.,*
 10 *Inc.*, 866 F. Supp. 1297, 1303 (D. Colo. 1994). Again, this could unfairly prejudice
 11 Federal.

12 Third, Mr. Shively's and Mr. Pillsbury's appearance at trial as both witnesses
 13 and advocates at least would create an appearance of impropriety. *See, e.g., Lyle v.*
 14 *Super. Ct. of San Bernardino Cty.*, 122 Cal. App. 3d 470, 83 (4th Dist. 1981)
 15 (appearance of impropriety lessened because attorney-witness would not participate
 16 in trial as advocate).

17 Because "the paramount concern must be the preservation of public trust both
 18 in the scrupulous administration of justice and in the integrity of the bar" (*Concat LP*
 19 *v. Unilever, PLC*, 350 F. Supp. 2d 796, 814 (N.D. Cal. 2004)), Mr. Shively and Mr.
 20 Pillsbury thus should be disqualified from serving as advocates at trial, including any
 21 depositions that may be used at trial. *See Lowe v. Experian*, 328 F. Supp. 2d 1122,
 22 1127 (D. Kan. 2004) (rule prohibiting counsel/witness from acting as an "advocate at
 23 trial" also barred counsel from taking or defending depositions) *World Youth Day*,
 24 866 F. Supp. at 1304 (same).

1 **III. CONCLUSION**

2 Federal respectfully requests that the Court disqualify Messrs. Shively and
3 Pillsbury from acting as advocates at any trial.

4
5 Dated: June 13, 2008

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